

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
KEVIN THOMAS MATUSZAK	)	CASE NO. 03-36193 HCD
	)	CHAPTER 7
	)	
DEBTOR.	)	
	)	
	)	
LORI CULVER,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 03-3163
	)	
KEVIN THOMAS MATUSZAK,	)	
	)	
DEFENDANT.	)	

Appearances:

Mary L. Kohn, Esq., Attorney for Plaintiff, 52303 Emmons Road, Suite 15, South Bend, Indiana 46637; and  
Debra Voltz-Miller, Esq., Attorney for Defendant, 108 North Main Street, Suite 423, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 29, 2004.

Lori Culver, the plaintiff in this case, filed the Amended Complaint for a Determination of the Dischargeability of a Debt on February 3, 2004. Formerly known as Lori Matuszak, the plaintiff brought this adversary proceeding against her former spouse, Kevin Thomas Matuszak, a chapter 7 debtor, to object to the dischargeability of a particular credit card debt pursuant to 11 U.S.C. § 523(a)(15). Trial on the complaint was held on July 20, 2004. After the presentation of evidence and arguments, the court took the matter under advisement. For the reasons that follow, the court denies the plaintiff's Amended Complaint.

### Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

### Background

The St. Joseph Circuit Court in South Bend, Indiana, entered a Final Decree of Dissolution on July 28, 1998, dissolving the marriage of Lori and Kevin Matuszak, the plaintiff and defendant in this adversary proceeding. The state court approved the Property Settlement Agreement negotiated and executed by Lori and Kevin. Under it, each one would assume the charge account debts incurred by him or her individually during the marriage. They agreed, as well, to cancel all joint credit accounts. Paragraph 6 of the Agreement, “Debts,” specifically stated:

Unless some other provision of this agreement provides specifically to the contrary, each party agrees that any indebtedness incurred by a party by charge account, credit card, open account, or otherwise, after the date of the filing of the petition herein shall be paid and discharged by the party incurring the same, and the other party shall have no liability for such indebtedness, and the party incurring such indebtedness shall hold the other party harmless from any liability thereon including costs and reasonable attorney fees.

The parties stipulate and agree that upon execution of this agreement, any joint charge accounts or credit cards that may exist shall be canceled, any open account indebtedness or open account upon which the parties may have joint liability for future charges shall be canceled and any guaranties executed by one party guarantying the obligation of the other party shall be canceled. Each party shall cooperate with the other in the cancellation of such indebtedness, and the obligation of a party to cancel such guaranty or joint credit accounts, shall be enforceable by one party against the other party with attorney fees following any failure of one party to cooperate or to complete such cancellation.

Pl. Ex. 6 at ¶ 6. The parties also agreed that the obligation each of them held was a “non-dischargeable debt under the Bankruptcy Code, this obligation being part of the final financial support settlement of both parties.” *Id.* ¶ 10.

The defendant filed a voluntary chapter 7 bankruptcy petition on October 29, 2003, and the plaintiff filed this adversary proceeding three months later. The complaint focused on only one debt, the obligation to the credit card company MBNA America Bank, N.A.. The plaintiff alleged in her complaint that the defendant failed to cancel the MBNA joint account, failed to pay the debt he had incurred using the account, and continued to charge on it. His conduct harmed her credit rating, she contended. She also asserted that the debtor had the income, means and ability to pay both the credit card debt and the damages caused to her by the debtor’s violation of the Property Settlement Agreement. In her view, discharging the debt would result in harm and detriment to her, the plaintiff, that outweighed the benefit to the debtor. The plaintiff requested that the debt be found nondischargeable under 11 U.S.C. § 523(a)(15).

In his answer to the complaint, the defendant denied the essential allegations. In particular, he stated that the decree did not require him to pay the entire balance of the MBNA account. He also denied that he continued to charge on the account. In the parties’ jointly prepared Pre-Trial Order, the plaintiff claimed that, when the marriage was dissolved, the balance on the MBNA account was \$0 and that the defendant was the only person to charge on that account after the marriage. He therefore should be solely liable for the payment of the debt, she urged. The defendant agreed that he indeed was the sole debtor on the debt and that the plaintiff was not a codebtor on the MBNA account.

Trial in the matter was held on July 19, 2004. The plaintiff was the first witness. Lori Culver testified that she and Kevin Matuszak were married in 1994 and divorced in 1998. Culver accused the debtor of violating the Property Settlement Agreement by using the MBNA credit card after July 28, 1998, the date the divorce was final and all joint charge accounts were to be canceled. When she found out that the joint card was open, the plaintiff closed it in August 2000. She stated that the account had a \$0 balance at the time of the divorce and that

she never charged on that account. Only her former spouse used that credit card after the divorce, she testified, and only he received the bills on the account.

However, her credit rating was harmed after the divorce, she said. In 2003, she was denied her request for a Bank One credit card account and was denied mortgage financing. Even after Kevin sent a letter saying he was solely responsible for the MBNA credit card, the mortgage financing she requested still was denied.

The plaintiff testified that MBNA and its successor, IBS, insisted that she was jointly liable on the account. *See* Pl. Ex. 14. She was not allowed to withdraw her name from the account, but she stated that she did cancel the account on August 22, 2000. She acknowledged that the defendant made a \$200 payment to MBNA on September 27, 2003. However, MBNA addressed bills to her after Kevin filed bankruptcy, she said, and the credit card company threatened to turn over the bill to a collection agency. It then offered to settle the liability for \$1,800. She agreed to the settlement amount, but claimed that her credit rating still was harmed because of the past delinquencies.

The plaintiff stated that she has remarried and has a five month-old daughter. She works part-time as a quality analyst at Whirlpool Corporation. Her husband is an environmental manager at a nursing home. Their net income, after taxes, is \$5,698 a month. *See* Pl. Ex. 22. She stated that her monthly expenses of \$5,931 are greater than her income and that she cannot afford to pay even the reduced MBNA agreed debt amount of \$1,800. She had other large debts; she listed \$28,000 in student loans, \$1,570 owed to the IRS, \$6,727 owed on her husband's AT&T credit card, and other credit card debts of \$2,765; \$7,445; and \$891. She also has a hospital bill of \$527 and a car insurance bill of \$725. She testified that she has a total of \$56,551 in unsecured debt to pay, in addition to the mortgage payment, utilities and two car payments.

On cross examination, the plaintiff testified that the only joint debt she and Kevin held during their marriage was the real property they bought in June 1994 and in December 1997, just weeks before their separation. She explained that both of them had contributed to the down payment of the second property, but she

assumed ownership of the property after 1997 and sold it in July 1999. She also stated that, last year, she and her husband earned a gross income of about \$95,000.

The plaintiff called two witnesses to demonstrate the harm to her credit rating and the impact it had when she and her present husband tried to obtain mortgage financing. Marsha McClure, a loan officer for TrustCorp Mortgage Company, testified that she had examined the credit report of the Culvers when they wanted a mortgage loan. The one problem on their credit report, she said, was the MBNA debt: A credit line had not been paid, and the payments were late. For that reason, the loan was approved at the higher interest rate of 6.375%, which was .625% above the prime rate of 5.75% listed by the Federal Home Loan mortgage market rates data base for March 2003. Under the “expanded level approval,” the Culvers were required to pay 5/8 of a point more for their mortgage, she stated.

Alan L. Kaufman, an accountant for thirty years, also testified that Lori Culver and her husband were damaged by the MBNA debt. In his opinion, the higher interest rate increased their thirty-year mortgage by more than \$35,000.

Kevin Matuszak, the debtor in this case, then testified. He stated that he obtained the MBNA credit card in 1992, when he was in college, and that he alone was and is the cardholder. At the time of the divorce, the property settlement divided their only joint property: The wife took the house in Granger and the 1993 Spirit as her sole property, and the husband took the 1997 Chrysler Sebring. The MBNA card was in his name, he said; he never filed a joint application, and he understood that any post-dissolution charges on it would be his debt only. He proffered Debtor’s Exhibits D through I, which demonstrated that only his name was on the MBNA bills and that he made some payments toward the debt. However, in January, June and July 2004, after he had filed bankruptcy, the statements for the same account were sent to “Lori Matuszak” at his address. *See Debtor’s Ex. J, K, L.*

The debtor explained that their divorce had been quite civil; therefore, when Lori requested it, he signed a letter to a mortgage company stating that he was responsible for that credit account. The letter, dated

October 2, 2002, also stated: “The account was opened jointly with my wife (ex-wife since 1998) and we have requested her name be removed, but the request was denied. I am working with a credit counseling company to pay this debt in full.” Debtor’s Ex. O. At trial, the defendant testified that the letter mistakenly said that they had opened a joint account. It never was a joint account, he stated.

The debtor testified that he is employed as a mechanical designer for Bosch. His monthly net income is \$3,196.00, and his monthly expenditures of \$3,293.87 exceed his income by almost \$100. *See* Debtor’s Ex. M, N. He lives alone in a rented apartment, and he must pay his electric bill for the apartment. As a professional, he is expected to dress professionally, to stay well groomed, and to dine out for lunch as part of his employment. For that reason, such bills as dry cleaning, haircuts, and meals out are necessities. He takes medications daily for his allergies, as well. His cell phone and cable are for his personal use, but are not expenditures that he feels he can eliminate. Although his debts are about \$100 a month greater than his income, he testified that there is nothing in his expenditures that he could eliminate. He has no disposable income, he said; moreover, it would place a burden on him if this debt were declared nondischargeable. He explained that his legal fees cover two attorneys: his bankruptcy attorney and the lawyer who represented him when he was charged with driving while under the influence of alcohol. He was required to pay \$1,500 for the attorney plus court fees of \$1,000-\$1,500. In addition, his automobile insurance probably will increase, he said.

On cross examination, the defendant was shown two documents: a letter dated June 29, 2002, from a “Customer Assistance Representative” of MBNA, addressed to both Lori and Kevin Matuszak; and a consumer report, printed September 25, 2003, listing the MBNA account as a joint account. *See* Pl. Ex. 15, 46. The defendant stated that he had never seen the letter from MBNA, and insisted that the credit account was never a joint account. He said he opened the account solely in his own name and he has no idea why MBNA has labeled the account “joint.” He admitted, however, that his expenditures have gone up since he filed his petition. He purchased an Audi 2001, for example, and his car payments increased, but only by \$21. His automobile

insurance went up after the accident. He reaffirmed the debt to purchase the Sebring, which his former wife drove, because it was a joint debt for which he took responsibility and, he said, he did not want to hurt her credit.

Culver returned to the stand to testify that she did not recall applying or filling out a form to be a co-debtor on the MBNA account, but she knows she is being charged as a co-debtor on the account. She concurred that, on the date of dissolution of their marriage, there was no debt, no balance on the MBNA account.

It was the plaintiff's position that the MBNA account was a joint marital debt that was not closed at the end of the divorce, as the Property Settlement Agreement stipulated. Whether the debtor was or was not aware of the joint status of the account, he used the card and accrued debt. The debt had accumulated to about \$6,000, and the defendant, by filing bankruptcy, had transferred the obligation to the plaintiff, his former spouse. Her credit rating had been excellent until she was considered liable on this account. The plaintiff asked that the debt and her damages resulting from the liability be found nondischargeable. She also noted that she was burdened with her own debt and that she and her present husband have substantial debts, as well.

The debtor responded that, under the Property Settlement Agreement, any debt incurred after the divorce would be his own debt. The evidence showed that the credit card was his alone before their marriage and that there was no balance on the card at the time of the divorce. There was no evidence to prove that the plaintiff was a joint debtor on the account. Although he had no explanation for the credit card company's statements to her, he insisted it was not a joint debt. In addition, the debtor pointed out that the plaintiff and her husband have substantial income and that his own income cannot cover his expenses and his additional legal costs and court costs. He concluded that she has the ability to pay the debt but that she should not have to pay it; it should be discharged in his bankruptcy, he claimed.

#### Discussion

The court is asked to determine whether the MBNA credit card obligation should be excepted from the defendant's discharge under 11 U.S.C. § 523(a)(15). That provision prohibits the dischargeability of "any marital debt other than alimony, maintenance or support that is incurred in connection with a divorce or

separation.” *In re Crosswhite*, 148 F.3d 879, 883 (7th Cir. 1998). It states that an individual debtor is not discharged from any debt –

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless –

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 523(a)(15). The plaintiff has the initial burden of proving that she holds a subsection (15) claim against the debtor, and then the burden shifts to the debtor defendant to prove that he falls within either of the two exceptions found in § 523(a)(15)(A) and (B). *See Crosswhite*, 148 F.3d at 884. In addition, “the party claiming an exception to discharge usually bears the burden of proving by a preponderance of the evidence that the debt is not dischargeable.” *Id.* at 881 (citing *Grogan v. Garner*, 498 U.S. 279, 287, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991)).

The court finds that the plaintiff did not succeed in meeting her initial burden of proving that the debt in question comes within the meaning of the statute.

To make that showing, the creditor must establish that the debt is within the purview of subsection (15) by demonstrating that it does not fall under § 523(a)(5) and that it nevertheless was incurred by the debtor in the course of the divorce or in connection with a divorce decree or similar agreement.

*Id.* at 884. The plaintiff apparently assumed that, because the credit card debt arose from the parties’ “Property Settlement Agreement,” it clearly was “not of the kind described in paragraph (5).” However, the debt at issue arose in connection with the divorce and therefore could have been categorized as either a § 523(a)(5) or (a)(15) debt. *See, e.g., Edenfield v. Fussell (In re Fussell)*, 303 B.R. 539, 545 (Bankr. S.D. Ga. 2003) (noting that debts payable to third parties, like credit card companies, may be viewed as maintenance or support obligations; finding that plaintiff failed to prove that the debtor’s assumption of the credit card debt was in the nature of

support); *In re Hayes*, 235 B.R. 885, 892-93 (Bankr. W.D. Tenn. 1999) (finding that the obligation to pay the parties' credit card debts was in the nature of support). The plaintiff had the responsibility of showing that it was not a debt for alimony, support or maintenance. She did not make that argument.

At trial, counsel for the defendant moved for judgment as a matter of law on the ground that the plaintiff had failed to meet her initial burden of demonstrating that she holds a § 523(a)(15) claim. Although the court would have been justified to dismiss the amended complaint on that ground, it declined to do so. It appeared to the court that the plaintiff's lack of proof was more of a technical or procedural failure than a substantive one. The court had taken note of the fact that the parties had presented no argument or evidence that the credit card debt was incurred in connection with alimony, maintenance or support payments. There was no suggestion that, at the time of the dissolution, the parties intended the obligations to be considered in the nature of support. The parties and the court clearly understood that the debt constituted a property settlement obligation. *See In re Fussell*, 303 B.R. at 545 (finding that the division of credit card debts between the parties appeared to be in the nature of a property settlement); *In re Dill*, 300 B.R. 658, 666 (Bankr. E.D. Va. 2003) (finding that a covenant not to further use joint credit cards is typical in property settlement agreements); *Baker v. Baker (In re Baker)*, 274 B.R. 176, 195 (Bankr. D.S.C. 2000) (finding that the credit card debts at issue did not fit within the requirements of § 523(a)(5), that the division of credit card debt obligations was intended as a property settlement). The court therefore determined that it would not grant judgment based solely on the failure of plaintiff's counsel to prove initially that this credit card obligation was "not of the kind described in paragraph (5)." The court was focused on the plaintiff's proof of the nature of her claim against the defendant.

It was the view of the court, based on the documents filed and the evidence presented in plaintiff's case at trial, that a critical issue of the proceeding was a factual as well as a legal one: whether the debt in question was a marital debt for which the plaintiff could be held liable. The plaintiff had labeled the MBNA debt a joint debt because MBNA was demanding payment from her, but in her testimony she agreed with the defendant that he was an individual cardholder and that she was never joined on the account. The defendant had

asserted that the credit card account was his own and that she could not be held liable for it. The trial went forward with the expectation that there would be more evidence from which the court could determine whether there was a joint marital debt for which the plaintiff would be responsible if the debtor did not pay it.

The court first finds, from the evidence presented, that there was no dispute about certain key facts:

- (a) The MBNA credit card was issued to the debtor in 1992 in his own name;
- (b) the plaintiff never used it;
- (c) neither Lori nor Kevin Matuszak filled out a request that it be a joint credit card;
- (d) the only joint property held by the Matuszaks during their marriage was their real property and two automobiles, and the Property Settlement Agreement specifically allocated them;
- (e) the Agreement did not list specific credit card obligations or designate any jointly held accounts;
- (f) the balance on the MBNA account was \$0 when the divorce was final;
- (g) the debt was accumulated after the divorce, when both the plaintiff and defendant believed that Kevin Matuszak was solely liable for the MBNA card; and
- (h) MBNA pursued the plaintiff in 2004 for collection of the debt.

The court also finds that both the plaintiff and the defendant were forthcoming and credible witnesses. They each explained the circumstances underlying the MBNA credit card debt with surprisingly little disagreement. Indeed, they agreed that the account was Kevin Matuszak's alone and that the plaintiff should not be held responsible for it. The evidence credibly demonstrated that there was a clear understanding between the parties that they would be solely responsible for their own debts on the credit cards. *See In re Baker*, 274 B.R. 176, 196 (Bankr. D.S.C. 2000).

At the conclusion of the trial, the court reviewed the evidence in the record and found that no evidence clearly indicated that the MBNA account was a joint account. The defendant credibly and consistently stated that the account was only in his name and demonstrated that the bills were sent to him, in his name and at his address, through 2003. The plaintiff also credibly stated her belief that the MBNA credit card was only in Kevin's name and that he was solely liable for the debt. She had no recollection of filling out a form to be a joint

creditor on the account but knew that, at some time in 2004, MBNA began pursuing her for collection of that debt. The plaintiff proffered no evidence of an application for, or approval of, a joint credit account. Plaintiff's exhibits 14 and 15, on which she relied, were unsigned memoranda, not on MBNA letterhead. In fact, the exhibits did not name MBNA and did not state that Lori and Kevin Matuszak were joint cardholders. The court found that those exhibits did not constitute proof that the account at issue was joint.

The defendant, not the plaintiff, presented evidence that MBNA sought payment from the plaintiff in January 2004. The bills were sent to "Lori Matuszak" more than five years after her divorce from Kevin Matuszak, and at Kevin's address. *See* Def. Ex. J, K, L. The plaintiff proffered no evidence of MBNA's basis for requiring that the plaintiff take responsibility for the defendant's obligation. *See, e.g., Renfro v. Draper*, 232 F.3d 688, 690 (9th Cir. 2000) (noting that, because of the husband's previous bankruptcy, a husband and wife had incurred joint obligations in the wife's name, and the divorce decree was tailored to address those debts). Indeed, counsel for the debtor suggested at trial that the plaintiff may have a remedy against the creditor MBNA but not against the defendant. The court is cognizant of the longstanding bankruptcy policy of protecting a debtor's spouse and children and of excepting from discharge marital debts that fall within the purview of §§ 523(a)(5) and (a)(15). *See Crosswhite*, 148 F.3d at 882. It also recognizes a debtor's capacity to discharge an obligation individually owed to a third party creditor. The court determines, therefore, that the plaintiff failed to prove, by a preponderance of the evidence, that the MBNA credit account was a marital debt that was owed to the defendant's former spouse and therefore that is covered by § 523(a)(15). *See* 4 Collier on Bankruptcy ¶ 523.21 at 523-106 (Alan N. Resnick and Henry J. Sommer, Eds. in Chief, 15th ed. rev'd 2004) (quoting the legislative history of § 523(a)(15), which provides: "The [523(a)(15)] exception applies only to debts incurred in a divorce or separation that are owed to a spouse or former spouse, and can be asserted only by the other party to the divorce or separation."); *see also In re Burton*, 242 B.R. 674, 678 (Bankr. W.D. Mo. 1999) (finding that plaintiff failed to meet initial burden of proof).

The court concludes that the plaintiff did not bear her initial burden of proof in two ways: She failed to demonstrate that the debt in question was not a § 523(a)(5) debt and that it was a joint marital debt that falls within the scope of paragraph (15). In light of the plaintiff's failure to meet her initial burden, the burden of proof does not shift to the debtor to establish that the debt was dischargeable because the conditions set forth in either of the two exceptions to nondischargeability were met.

#### Conclusion

For the reasons stated above, the Amended Complaint for a Determination of the Dischargeability of a Debt, filed by the plaintiff Lori Culver against the defendant Kevin Thomas Matuszak, is denied

SO ORDERED.

Handwritten signature of Harry C. Dees, Jr. in black ink, with the initials JSOI to the right.

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HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT